THE TALMUDICAL LAW OF AGENCY.

THE present paper is an attempt to give an account of the Talmudical Law of Representation or Agency, together with a comparison, wherever such comparison seems applicable, of the Talmudical Law with the law on the same subject in the Roman and English systems. The paper must be considered to touch upon salient points rather than to give a Digest or a Code of the Talmudical Law of this important branch of Jurisprudence.

What do we mean by an Agent or Procurator, or שְׁלִיחַ (nuntius)? The Roman Law defines a Procurator as follows: "Procurator est qui aliena negotia mandatu domini administrat," and the Digest pithily puts the use of a Procurator thus: "Usus autem procuratoris *perquam* necessarius est, ut qui rebus suis ipsi superesse vel nolunt, vel non possunt, per alios possint vel agere, vel conveniri." Talmudical Law agrees exactly with other systems, in its definition of a שליח, and in allowing the appointment of a שליח it is actuated by the same need as allows such appointments in all systems of Law.

It may be necessary to notice by the way that a distinction is sometimes made between a "messenger" and an "agent." Sohm, in his *Institutes of Roman Law,* puts the distinction thus: "If I desire to conclude a juristic act on my own behalf, and am prevented by purely physical reasons, I may frequently avail myself of the services of a messenger. The messenger serves precisely the same purpose as a letter, the purpose, namely, of overcoming the physical obstacles of distance. He makes the journey instead of me, but it is I myself who conclude the juristic

act. Suppose, however, that in thus employing another, I have no intention of concluding the transaction myself, because I prefer not to determine all the details myself. It may be my purpose to let the negotiations, conducted with the person whom I have commissioned, decide the result, and be regarded in the same way as though they were carried on by myself in my own behalf. In that case the person whom I employ is not merely to save me the journey but is to conclude the juristic act for me. He is to weigh all the surrounding circumstances, and the decision, the exertion of the will by virtue of which the juristic act is concluded, is his, not mine. Such is the nature of representation. A messenger is merely a conduit pipe for conveying my will, a representative is a person who wills instead of me. Representation, then, is the conclusion of a juristic act by one person acting for another." Although jurists have sometimes made much of this distinction, I do not think it is a logical one. Careful consideration will show that the distinction depends upon the extent of the "mandatum" or the authority given to the "agent" by his "dominus" or "principal." The *authority* may be wide in its scope, or it may be very narrow. Talmudical Law knows nothing of the distinction. A man may say to his שליח, Go and enter into a marriage contract for me with a certain lady living at a certain place, or he may give his agent authority to enter into a marriage contract for him with a lady whom he (the agent) may think suitable for his principal. In any case the agent is called a שליח, a "nuntius," a messenger.

Let us see what the Talmud itself tells us about the שליח generally. Perhaps it is well to point out that there is no treatise on agency in the Talmud. The matter is only treated by the way while treating of another subject. The classical passage is to be found at the beginning of the second chapter of Kiddushin, and runs as follows: האיש מקדש בו ובשלוחו האשה מתקדשת בה ובשלוחה. A man may enter into a marriage contract either by himself directly or through

an agent; a woman may enter into a marriage contract either directly or through an agent. I think that in order to avoid misapprehension it is necessary to add that it is not recommended to enter into the marriage contract by means of a שליח. First, it is said, that men ought themselves to perform the מצוות or divine precepts, and marriage is such a precept; and, secondly, it is an איסור, a prohibition to marry a woman without having seen her. But the objections are ethical rather than legal.

It would be interesting, if space permitted, to go through the long logical argument by which the Talmud proves from the Scriptures the doctrine of agency. Talmudical Law was mainly concerned with the development of the Law of the Torah, and like other old systems hardly knew the meaning of *direct* legislation. Agency had become a necessity in the developed life of the community. It was important, therefore, to find the doctrine of agency in the Pentateuch. The argument may be stated shortly as follows:—Reference is made to the Biblical Law of Divorce ("and he shall send her away," Deut. xxiv. 1–4), and the word ושלחה is pressed. One might have expected instead of this verb וְגֵרְשָׁהּ, "and he shall drive her away," the more common verb for "to divorce." Since, however, ושלחה is used, we have a proof that the man who gives the גט or bill of divorcement may appoint an agent to give it, and since it is possible to read the same word ושלחה without a Mappiq in the ה, the admissibility of the woman appointing an agent to receive the גט is proved according to the exegesis of the Talmud. But the Talmud rightly objects that thus agency is proved only in the matter of Divorce, how can we extend agency beyond Divorce? After all Divorce is an exceptional matter, seeing that the third party to whom the שליח of the husband is sent is בְּעַל כָּרְחָהּ, that is to say, has no option to refuse, and thus Divorce is removed from ordinary juristic acts. The Talmud goes back to verse 2 of our chapter in Deuteronomy. In that verse the two verbs ויצאה והיתה will be found in juxtaposition,

and the argument runs as follows:—Since Divorce (ויצאה, "and she shall go out") can take place by means of an agent, so marriage (והיתה לאיש אחר, "and she shall be for another husband") can take place by means of an agent. But even now the doctrine of agency can only be applied to the two special cases of Divorce and Marriage. How can we make its application general? Will the fact that the תרומה, or heave-offering which the Levite gave to the Priest, could be separated by means of an agent (in accordance with the Talmudical exegesis of pressing the word גם in the phrase גם אתם (Num. xviii. 28)), help us in establishing the general rule. No, answers the Talmud, the separation of תרומה is different from other legal acts, since it can be separated במחשבה without any *actual act* of separation. Rabbi Joshua ben Korchah draws the general doctrine of agency and the permissibility to do an act which we find it either impossible or inconvenient to do ourselves from the verse in Exodus, which treats of the Paschal Lamb, ושחטו אותו כל קהל עדת ישראל, "And all the congregation of Israel shall slay it;" and he pertinently asks the question, וכי כל הקהל כולן שוחטין, Do the *whole* congregation kill the Paschal Lamb? But then the objection might be urged that the Paschal Lamb belonged to the category of קדשים, or sacrifices in which the principle of agency is perforce admitted, שכן רוב מעשיהם על ידי שליח. The outcome of the Talmud on the matter, and this too is the terse summing up of the celebrated Asheri, is that the doctrine of agency is extracted from the Paschal Lamb and Divorce combined. If the objection already referred to is urged against the former, then the fact of Divorce answers that objection. If the objection is urged against Divorce that agency is applicable there because the wife has no option but to receive the גט, then the Paschal Lamb disposes of that objection. To use Talmudical language, agency is extracted מבייניהו. The lawyer cannot help admiring the "elegance" with which the Talmudical lawyers arrive at their goal.

The relationship in Talmudical Law between the prin-

cipal and the agent is expressed in the maxim, שלוחו של אדם כמותו, "A man's agent is as himself," and the Talmud is prepared to carry this maxim to its full logical consequences. The agent may do all that his principal can do. Those who may be principals may be agents, and vice versa. Who, now, can be agents? According to Roman and English Law, few are excluded from being agents. According to Talmudical Law, the following rules are to be noted: A נכרי, an alien, can neither appoint an Israelite as an agent, nor can he be appointed by an Israelite as an agent, i. e. an alien can be neither principal nor agent to an Israelite. This might have been inferred from the fact that the doctrine of agency is derived from Marriage and Divorce, neither of which, according even to the Pentateuch, would apply as practical law between Israelites and aliens, or it might have been derived from the Bible verse referring to the Paschal Lamb, which of course cannot be applied to an alien, but the Talmud finds a special reason to emphasize the exclusion of the נכרי in the words גַּם אַתֶּם, "even ye," in the passage already referred to relating to the Terumah or heave-offering, words which, according to Talmudical exegesis, imply the necessity of equality, before the law, of principal and agent with respect to the covenant of Israel, and therefore the exclusion of the alien. A קטן, a child, and one of unsound mind cannot be principals and cannot be agents, because they are not בני דעת, i. e. have no legal knowledge. A woman, or a Hebrew slave, male or female, because, in their own sphere, the law is binding upon them, come within the law of agency. Again, those who cannot legally act for themselves cannot legally be principals. This would lead to practical difficulties, but the difficulty is overcome in Talmudical Law, as in other systems of Law, by what is called "tutelary representation." A guardian a tutor or Epitropos, which last term the Talmud borrowed from the Greek translation of the Roman term, was fully qualified to act on behalf of his ward, so long as he did not act to his ward's disadvan-

tage. Of course, what is disadvantage in this sense would give room for discussion. According to Maimonides (Hilchot Nachalot, XI) the Epitropos could neither bring nor defend an action on behalf of his ward. Abraham ben David of Posquières (ראב"ד), in his gloss on Maimonides, asserts that while the guardian may be the agent of his ward to prosecute a claim, he cannot be his agent to defend it.

The following case may be interesting as showing the extent to which the dictum that a קטן, a child or infant, who of course ceases to be an infant at a much earlier age than in Roman or English Law, cannot be an agent. A father sends his son with a bottle and a coin of the value of a florin to buy a shilling's worth of oil, and bring back the change. The shopkeeper measures the oil, gives it in the bottle to the boy and also gives him the change. The boy loses the change and breaks the bottle. Who is responsible for the loss? The answer is that the shopkeeper is responsible for the loss of the oil and the change, because he ought to have known that all for which the boy's father could have sent him was to order the oil, that he could not have been his father's agent to complete the purchase and bring the oil. The father of the boy has to bear the loss of the bottle because he wilfully ran the risk of the breaking of the bottle, when he gave it to the boy. In Rabbinical language, the bottle was אבידה מדעת at the very moment when the father gave it to the boy.

Perhaps one of the most interesting discussions in the Talmud, as to the nature of agency generally, is to be found in a short passage where the position of the כהן or priest is discussed. Is the priest the representative of the person who brings the sacrifice, or the representative of God who receives it? שלוחי דרחמנא or שלוחי דידן? Rab Huna settles the question in favour of the latter view, and does not incommode the question with any mystical theory, but simply remaining faithful to the first principles of agency, asks the question, "Can an agent do that for us which we

are unable legally to do ourselves": מי איכא מרי דאנן לא מצינן עבדינן ואינהו מצי עבדי? So the Halachic decision seems to be. Perhaps it might have been solved thus. According to Scripture, it was God who appointed the priests to bring the sacrifice, therefore they must be the agents of him who appointed them. The question might be asked what practical difference can result from the solution of the question as to the priest's principal. The practical difference the Talmud exemplifies thus: Reuben makes a vow that he will partake of no benefit which comes to him from Ṣimeon or כהן. Can Reuben avail himself of Simeon's services to let him bring his sacrifice? The answer is in the affirmative, because the כהן stands in no legal relation to the בעל הקרבן, the bringer of the sacrifices. The question, however, is not simple, and the discussion on the same subject, in treatise Nedarim, should be taken into account where an attempt is made to distinguish between sacrifices which do and sacrifices which do not require the knowledge of the person on whose behalf they are brought, such as those which are brought after one has suffered a Levitical impurity, the sacrifices called in technical language מחוסרי כפרה.

That the Talmud had a sound idea of the nature of agency does not need further proof. We must now consider an interesting question. Did the Talmudical Law of agency advance beyond the Roman Law? The Roman Law, it should be stated, was far behind modern systems of law in its conception of agency. For what is the nature of true agency? I may quote from an excursus by Moyle in his excellent edition of the *Institutes of Justinian*. The test of true agency is this: To what extent is it possible for *B* to make a contract with *C* for *A*, so that assuming, of course, that *B* discloses the fact of his agency, and his principal's name, and does not exceed his instructions, *A* alone acquires rights against and can sue *C*. *C* acquires rights against and can sue *A* only, and *B* neither acquires rights nor incurs liabilities, under

the contract. Leaving out of the discussion the theory of Savigny, which is based upon a reading in a passage in Justinian's Digest, ascribed to the celebrated jurist Modestinus, the crucial reading in which is now held to be false, the Roman law of agency with respect to contract is very clumsy. Moyle puts the matter thus: "If *A* being at Rome wishes to buy a house belonging to *C* at Naples, he would give *B* at Naples a mandate to buy it for him. *B* does so, and then assigns his rights against *C* to *A*. *C*'s rights against *B*, e. g. his claim for the purchase-money, can be made available against *A* only by a novation (that is to say, a distinct stipulation from *A* that he will pay *C* for *B*); if this is not done, *C*, if necessary, must recover from *B* by *actio venditi*, and *B* from *A* by *actio mandati contraria*, an action to recover the money which *B* has laid out for him. Here none of the conditions above specified are realized, and it should be specially pointed out that *B* is in fact the principal and the true vendor throughout, and the only person who is entitled and bound in that capacity." It was different, it is true, when *res corporeales* were actually delivered. Then the agent could take possession for his principal, though according to the older Roman Law even this was not possible, for the maxim held good "per extraneam personam acquiri non potest." Now that the Talmudical Law went as far as the latest Roman Law, there can possibly be no doubt. The following passage from the well-known Code called the *Tur*, compiled by Jacob Asheri of Toledo, proves this to the hilt: "If Reuben says to Simeon, זבין לי מידי, Buy something for me, and Simeon buys מסתמא unconditionally, then in that case Reuben acquires possession (קנייה ראובן) from the very moment of delivery" (Choshen Hammishpat, 183).

Does Talmudical Law go farther than this, and admit agency in contract as distinguished from delivery of possession? I think I may safely say that it does, or at any rate, that it can. The Talmud never once loses hold of its great principle in agency שלוחו של אדם כמותו. The agent of

a man can do all that his principal can do. It is true, that according to the Talmudical Law of Sale, which was amended in the interest of the purchaser, there would be no complete sale of *mobilia* without some form of delivery הנבהה משיכה, that is to say, a mere contract of sale did not complete the sale; but the Talmud acknowledges that originally, according to the Torah itself, the giving of the purchase-money by the buyer completed the purchase; and we find in the Talmud, in the name of Rava, a decision according to which the actual delivery became a mere formality, e. g. it was sufficient for the purchaser to put a mark upon the things he bought, and the celebrated Rabbi Solomon ben Aderet of Barcelona is quoted in a gloss of Joseph Karo's Commentary on the code of Maimonides, to the effect that in all commercial matters the custom of the merchants in the province where the transaction takes place must be held to be binding. Certainly, in this manner, a contract of sale of mobilia which may take place according to English Law (I am leaving out of account, of course, the Statute of Frauds) without actual payment of money and without actual delivery, could take place in England according to Talmudical Law under the same conditions, and if we remain firm to our principle that an agent of man is as himself, it follows that if the principal may enter into such a contract, so may his agent for him. With regard to *immobilia*, a sale was complete in Talmudical Law when the שטר, or deed of sale, had been written and delivered and the money paid—in some cases even the last was not necessary. Here, clearly חזקה or actual delivery of the thing itself, though a possible form of completion, was not a necessary form, and clearly too a man could buy land through an agent, without the employment of the roundabout method needed by Roman Law. With regard to agency, then, the civil legislation of the Talmud would require no reform to bring it on a level with our modern systems.

We are, therefore, clear now as to the true nature of

agency in our Talmudical Law—are there cases in which a man cannot appoint an agent? I think the answer is afforded by our general principles. That which we cannot legally or morally do ourselves, we cannot appoint an agent to do. The Talmud expresses this in the maxim, אין שליח לדבר עבירה, "There is no agent to do a wrong." This also agrees with the general principle of the Roman Law. Ulpian lays down "Rei turpis nullum est mandatum." The Talmud shows here again its grip of logical consequences, and lays down further that a man cannot appoint an agent to do that which he could not do himself at the time of the appointment of the agent, although he might have been able to do it afterwards. To illustrate: *A* appoints *B* as agent to marry for him *C*, whom he believes to be divorced. *C* is not divorced at the time of the appointment of *B*, but is divorced at the time when *B* reaches her. *B* cannot marry *C* for *A*. The fact that *C* was a married woman at the time of *B*'s appointment invalidates his agency. The general maxim on this point is: לא משוי אינש שליח אלא במלתא דעביד השתא במלתא דלא מצי עביד ליה השתא לא משוי שליח (Nazir, 12 b). Wherein does the Talmud find its general rule, "There is no agent to do a wrong"? It gives a moral foundation for the rule in the maxim: דברי הרב ודברי התלמיד דברו מי שומעים, "If there be a contradiction between the words of a teacher and the words of his disciple, to whom should you give heed?" or, in other words, where there is a contradiction between a divine command, and a human command, heed must be given to the divine command. Therefore if a principal gives his agent commission to do a wrong, the divine command annuls the commission of his principal, and since there is no commission, there is no agent. But the Talmud also builds up this rule by pressing the demonstrative pronoun ההוא *that* in the verse in Leviticus xvii. 4: דם יחשב לאיש ההוא, "It shall be reckoned sin to *that* man only." The קרבן נתנאל, a commentary on Asheri's summing up of the Talmud, urges that if the agent were not aware of the wrongfulness of his agency, his

appointment as agent could not be declared void on the ground of the moral maxim. The writer therefore prefers to build up the rule on the verse in Leviticus to building it on the more general maxim.

There is one exception to the general rule that there is no agent to do a wrong, and that is in the case of מעילה or the inadvertent conversion of temple property to profane use, but this exception is not founded upon a legal principle, but upon the so-called גזרה שוה, a similarity of phrase in two verses, an exegesis, according to Talmudical theory, taught by tradition and not by logic (see the use of חטא in Lev. v. 15 and Num. xviii. 32).

The dictum that there is no agency in wrong doing, is not, however, universally admitted in the Talmud. Shammai, the contemporary of Hillel, did not accept it, and he grounds his dissent which is referred back to the prophet Haggai upon the fact that Nathan when accusing David of his sin against Uriah, said to him, אתו הרגת בחרב בני עמון, "Thou didst slay him with the sword of the children of Ammon" (2 Sam. xii. 9), although it was not David who had slain Uriah, but the Ammonites. But even Shammai would admit, says the Talmud, that if I said to a person, Go and eat forbidden food, that I could not be regarded as the principal and deserving of punishment, and the person who ate the food as the agent and free. Shammai would make this exception on the ground that there is no instance in the Law of a person being punished for a wrongful act, from which he had no enjoyment, זה נהנה וזה מתחייב לא אמרינן. It is very doubtful whether such a case is a case of agency at all. Gaius speaks as follows of a parallel case in Roman Law: "Cuius generis mandatum magis consilium est quam mandatum et ob id non est obligatorium, quia nemo ex consilio obligatus, etiam si non expediat ei cui dabatur quia liberum est cuique apud se explorare, an expediat sibi consilium" (XVII. i. 2, 6).

Excluding the dissent of Shammai then, the maxim אין שליח לדבר עבירה holds good in all cases except that

of מעילה already referred to, and the Talmud makes no distinction whatever between crimes and delicts or torts or civil wrongs which arise from the negligence or carelessness of an agent or servant in the performance of a duty. The idea of a crime as distinct from a tort is not clearly marked in the Talmudical system. In this it agrees with other ancient systems of law. The case where a man is held liable for injury done when he leaves an ox, or a pit, or a fire, or some other source of injury, in charge of a child or one of unsound mind, is no exception to the rule. These cannot be agents, and therefore the responsibility does not proceed from agency.

Let us see how the matter stands in other systems of law with respect to vicarious responsibility. The Roman Law does recognize it, at any rate in its later stages, with respect to what are called "quasi delicts," e. g. if anything is thrown out of a window in a house which I own or which I hire, to the injury of a passer-by, or if anything is stolen by the servants of the innkeeper, I and the innkeeper are liable. It is, however, acknowledged in the Digest that the Edict of the Praetor which admitted an action in this case, was founded upon expediency, nor was there any injustice in the rule, for it lay within the innkeeper's discretion whether he would accept the goods or not; besides it is his own fault if he employs careless servants (quod opera malorum hominum uteretur).

In English Law, the maxim "Respondeat superior" holds good in the case of torts, though not in the case of crimes. It is upon this doctrine that a Railway Company is responsible, civilly, for a so-called accident caused by the negligence of its servants, but it is very doubtful whether cases like these in English Law come at all under the category of principal and agent. It is clearly laid down that the contract of agency or service cannot impose any obligation on the agent or servant to commit or assist in the committing of fraud, or any other wrong. As between the agent or the servant and the principal or employer either is liable

for the whole damage, and when the plaintiff has made his choice which of the two to sue, he is concluded by it. Moreover, there is, generally speaking, no contribution between the so-called agent and his principal. If the agent has been sued alone, and compelled to pay the whole damage, he has no right to indemnity or contribution from his principal. The severity with which the Talmud applies its rule, "There can be no agency to do a wrong," is strictly logical, and Sir William Anson, in his well-known work on Contracts, regards the English rule, "Respondeat superior," as illogical. He says, "It would be interesting to inquire how far the doctrine of representation in such cases is of modern origin. It may be that the extreme form which Employer's Liability has assumed in English Law is an application to modern society of rules which are properly applicable when the master is served by slaves, and is liable for injuries done by them as being part of his property."

We have now, I think, touched upon some of the chief principles of the Law of Agency. We shall discuss now the relationship, not of the agent and principal to third parties, but of their relationship to each other. First, how is a שליח or agent appointed? Generally, according to Talmudical Law, no formalities at all are required. If, however, I wish to appoint an agent in a law-suit, or in any matter where there is not an acquiescent but an opposing third party, there must be an instrument in writing called a כתב הרשאה or deed giving permission. The reason for this is rightly stated to be, that without it my opponent might turn to my agent and say, "I have nothing to do with you; you are no party in the cause:" אין אתה בעל דיני. In the Roman Law, in its later stages, no special form was necessary in the appointment of procurators or agents to carry on law-suits.

Whether an agent can be appointed by me by conduct or sufferance without express words on my part, whether for instance I should, according to Talmudical Law, be bound

to the shopkeeper for what I have allowed my wife or my servant to buy habitually on credit, has not been decided so far as I know. It is worth while, however, pointing out that partnership is in English Law an illustration of agency by implication. It is well known that in Roman Law the contract of "societas" or partnership is but in an embryo state, and does not discuss aught beyond the distribution of the partnership goods. In the great code of Maimonides, agency and partnership are placed under one rubric. It is, therefore, probable that the Talmud would recognize "implied agency." Whether agency may be formed by subsequent ratification is also doubtful, although it is hard to see how the Talmud could have formulated its principle זכין לאדם שלא בפניו, that a contract may be entered into for a man without that man's authority, if there be a well-founded presumption that that man would consider such contract to be to his advantage, if agency by subsequent ratification were wholly unrecognized.

What are the duties of the agent? The Talmud distinguishes two kinds of agent: (1) the agent who performs his duties gratuitously; (2) the agent who renders his services for a reward—the so-called סרסר. The Roman Law considers the first to be the only true agent or *mandatarius*; the latter is moved from the contract of *mandatum* to that of *Locatio conductio*—Letting and Hiring. In this case I have not an agent, according to Roman Law, I have hired some one to perform a particular service for me.

The first duty of an agent is to perform what he has promised to perform, that is to say, to do his שליחות, to carry out his instructions. If he does not do this, the Talmud distinguishes between the שליח and the סרסר. In the first case, if, for instance, he buys barley when he is told to buy wheat, the whole business is בטל or void. If he is paid, then he is responsible, and is obliged to pay damages. I ought to add, that in both cases and always it is assumed that the שליח has disclosed the fact that he

is an agent. If he has not disclosed this fact, then, in both cases, the agent has purchased for himself. This is rational, because secret representation is no true representation. There is one case, however, in which even the agent who performs his work gratuitously must make good to his principal the deficient accomplishment of his agency. If a principal appoints an agent to buy land for him, and the agent buys for him without what is called אחריות, *cautio de evictione*, "security against eviction," then in such a case the agent is regarded as having purchased for his principal without such *cautio*, and he must sell to his principal with his own personal security.

Again, according to English and Roman Law, the agent must deliver up to his principal all benefits resulting from the execution of the agency. Both systems consider the whole contract of agency to be founded upon confidence. Speaking of the contract of *mandatum*, Paul says, "Originem ex officio atque amicitia trahit." English Law sternly prohibits anything which might tend to make the agent's interest clash with his duty. Talmudic Law does not go so far as this. If, for instance, the third party gave the agent a present in connexion with his agency, English Law would say that the present belonged to the principal: Talmudical Law lays down that the present is to be divided between the principal and the agent; not that it ought not, in strict law, to belong to the agent, but because the present was after all indirectly derived from the employment of the principal's money, the principal should have a share in it.

Owing to the same intention, the prevention of the agent's duty clashing with his interest, both English and Roman Law hold that if an agent is appointed to buy he must not himself sell, and if an agent is appointed to sell he must not himself buy. Talmudical Law has the same maxim, but deduces it by a most elegant piece of legal logic from the general principle שלוחו של אדם כמותו, "A man's agent is as himself." Sale, says the Tur, always comprises

the transfer of a thing from the רשות or ownership of one person to that of another. If, therefore, I appoint an agent to buy for me, he stands exactly in the same position as I do; he is, so far as his agency is concerned, my *alter ego*. If, therefore, my agent sells to me, instead of buying from another for me, it is as if I sold a thing to myself—which is, of course, an absurdity.

Again, the agent must not appoint a sub-agent. "Delegatus non potest delegare:" אין שליח עושה שליח. In all systems of law, the reason seems clear. I may have confidence that *A* may perform a certain business for me in accordance with my wishes: I may have no confidence that *B* appointed by *A* will perform the business equally to my satisfaction. The rule in Talmudical Law is founded upon the theory that "Agency" is a matter of confidence, but the point of view is rather different from what it is in other systems. In case of any dispute between principal and agent, the agent would be put upon his oath to swear that he was not guilty; and in Talmudical Law, as in Roman Law, the "jusjurandum in jure," the oath, was not merely administered to the witness as a warning that he should speak the truth,—it was of a "decisory" nature; it was, in fact, a sort of ordeal. In an analogous case mentioned in the treatise *Baba Kama* (11 b), it is laid down that a שומר or depositee, with whom I deposit an article, may not appoint another person to guard the thing. Not even a שומר חנם, a person who charges nothing to take care of the goods, may appoint a paid depositee or שומר שכר, because I might well turn round in case of damage, and say, "I am willing to believe you when you swear an oath; I am not willing to believe the man whom you may appoint."

There is one case in Talmudical Law in which an agent may appoint a sub-agent, that is in the case of taking a גט or bill of divorcement from the husband to the wife. The Talmud, following its exegetical method, founds this upon the fact that the verb שלח occurs three times in the

passage in Deuteronomy which treats of divorce. But the rule is rational. The שליח or agent, who takes a גט to a wife to be divorced, has really no third party to deal with, as, according to the letter of the Bible Law, the wife is obliged to receive the גט, even against her will בעל כרחה.

The amount of liability which falls upon an agent, if, e.g. the goods which he buys for his principal should be damaged while in his possession, varies, according to the Talmud, as he is unpaid or paid (פרסר). In the former case, it is the liability of a שומר חנם, of one who takes care of my goods free of charge. He is responsible for פשיעה, which is equivalent to the Latin "dolus aut culpa lata," actual wilful injury and gross negligence. If the agent is paid, his liability is that of the שומר שכר, one whom I pay to take care of my goods. He is responsible for loss, or breakage, or theft; for all cases, in fact, where there is no *vis maior*. Both Roman and English Law demand the greatest amount of care, "exacta diligentia," in all cases. The agent must use the care of a "bonus paterfamilias;" he must exercise the same amount of care, not as he may do in his own affairs, but as a prudent man of the world would do in his own affairs. There is, however, no complete unanimity on this point among the Roman lawyers. I might refer to a dictum of Modestinus in the *Collatio* (x. 2, 3).

How could שליחות come to an end, otherwise than by the performing of the agency? Of course, the principal could revoke. The agent can also renounce. In Roman Law, only, unless he were compelled by illness, &c., if he could do so in such time, that full power was left to the *mandator* or principal of doing the same business conveniently, either by himself or by another person. The *ius* must be *integrum*. According to Talmudical Law the gratuitous agent could always renounce.

Agency would also come to an end with the death of the agent or principal. In Roman Law a distinction is rightly made when the *mandatarius* did not know of the death

of the *mandator*. "Mandatum solvitur morte. Si tamen per ignorantiam impletum est, competere actionem utilitatis causa dicitur" (Paulus, *Digest.* xvii. 1. 26 pr.).

There is one special rule of evidence with regard to the Talmudical Law of Agency which is very interesting. There is a presumption of law that every agent performs his agency: חזקה ששלית עושה שליחותו. What would happen if I appoint an agent to marry a lady for me whom he considers suitable, and he dies without my knowing with whom he entered into the marriage contract on my behalf? The Talmud and the Commentaries point out some interesting complications.

I have attempted here to give some notes on the Talmudical Law of Agency. It is proved, I think, that the Talmud had a firm grip of legal principles, that it was masterly in its application of them, and that it would be perfectly capable of being developed on its civil side to meet the legal wants of men and women living under the complicated conditions of modern society.

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